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# In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 361

HONORABLE FRANCIS G. CAFFEY, JUDGE OF THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK, ET AL., PETITIONERS

*v.*

THE UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinion of the United States District Court for the Southern District of New York (R. 17–29) is reported in 1943 A. M. C. 715. The opinion of the United States Circuit Court of Appeals for the Second Circuit (R. 37–41) is reported in 141 F. (2d) 69.

### JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Second Circuit was entered on May 2, 1944 (R. 47–49). By an order of

June 19, 1944, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to August 22, 1944 (R. 50). The petition for a writ of certiorari was filed on August 18, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED

Whether the Public Vessels Act of 1925 authorizes suit against the United States for damages to a private vessel and its cargo caused by a vessel which had been transferred by the United States to the British government pursuant to the Lend-Lease Act, and which at the time of the accident was manned, officered, controlled, and operated by the British government as a unit of the Royal Navy.

## STATUTES INVOLVED

The relevant portions of the statutes involved are set forth in the Appendix, pp. 15–21, *infra*.

## STATEMENT

On May 3, 1943, the United States instituted this proceeding in the United States Circuit Court of Appeals for the Second Circuit by filing a motion for leave to file a petition for a writ of prohibition and/or mandamus against the Honorable Francis G. Caffey, Judge of the District Court of the United States for the Southern District of New York and against the other judges

and officers of the court (R. 2–3). The petition sought to prohibit these judges and officers from further exercising jurisdiction in the case of *Agwilines, Inc., as Owner of the Steamship "Brazos" and as Bailee of the Cargo Laden Therein, Libelant,* v. *United States of America, Respondents,* In Admiralty, No. 124–337, and to compel them to vacate an order entered by Judge Caffey on April 3, 1943, dismissing the exceptive allegations filed in that case by the United States and directing the United States to answer the libel and intervening petition in the case (R. 3–30).

The facts set forth in the petition for prohibition and mandamus may be summarized as follows (R. 3–7, 8–10):

On April 15, 1942, Agwilines, Inc., a Maine corporation, as owner of the Steamship *Brazos* and bailee of its cargo, filed a libel *in personam* in admiralty against the United States in the District Court of the United States for the Southern District of New York, seeking to recover $850,000 for damages incurred in the loss of the *Brazos* and her cargo (R. 8–10). The libel in substance alleged that on January 13, 1942, a motor vessel owned by the United States (formerly named the *Mormacland*) collided with the *Brazos,* causing the damages in question; that the collision was due solely to the fault and negligence of the motor vessel and those in charge of her; and that at the time of the collision, the motor vessel was a "public vessel of the United States."

The United States, appearing specially to challenge the jurisdiction of the District Court, filed exceptive allegations (R. 11–13) setting forth the following facts: In April 1941 the British government, pursuant to the Lend-Lease Act (see Appendix, pp. 19–21, *infra*), requisitioned from the United States a vessel of the type of the *Mormacland* for use as a naval vessel of war. To fill this requisition, the United States Maritime Commission purchased the motor vessel *Mormacland,* and after having her reconditioned by the United States Navy, delivered her to the British government on November 17, 1941, pursuant to the Lend-Lease Act. Upon delivery of the vessel, Their Lord Commissioners of the Admiralty, on behalf of His Brittanic Majesty, executed a receipt which recited acceptance of "physical delivery of the vessel named *Archer* (ex-*Mormacland*), * * * said delivery being made pursuant to the" Lend-Lease Act "for utilization under charter or other arrangements to be hereafter mutually agreed upon." From November 17, 1941, and continuously thereafter (including the date of the collision), the motor vessel was in the possession and under the exclusive command and control of the British government, which renamed her the H. M. S. *Archer,* and commissioned, officered, manned, supplied, and operated her as a unit of the Royal Navy.

Emergency conditions had required actual delivery of the vessel in advance and in anticipa-

tion of a Master Agreement to be entered into between the two governments. Such an agreement was executed on February 23, 1942, providing for mutual aid between the two governments, and reciting the expediency of deferring final determination of the terms and conditions upon which aid would be interchanged until the progress of events had made clearer what the final terms should be. Article I of the Master Agreement provided that the United States would continue to supply the United Kingdom with such defense articles, services, and information as the President should authorize. Article V provided that the United Kingdom would return at the end of the emergency, as determined by the President, such articles transferred under said Agreement (and not destroyed, lost, or consumed) as should be determined by the President to be useful in the defense of the United States or the western hemisphere or to be of use otherwise to the United States (R. 12–13).[1]

The exceptive allegations concluded that, by reason of the foregoing facts, the proceedings in the District Court were outside the scope of the Suits in Admiralty Act of 1920 and the Public Vessels Act of 1925 (see Appendix, pp. 15–19, *infra*) and constituted a suit against the United States

[1] The Agreement is set forth in *Report on the First Year of Lend-Lease Operations*, H. Doc. No. 661, 77th Cong., 2d Sess., pp. 50–52.

without its consent.[2] Libelant moved to strike the exceptive allegations, and on April 3, 1943, District Judge Caffey, accepting as true the facts set up in the allegations, granted the motion on the ground that the H. M. S. *Archer* was a "public vessel of the United States" within the meaning of the Public Vessels Act (R. 17–29).

After setting forth the above facts, the petition for a writ of prohibition and/or mandamus alleged that the conclusions of Judge Caffey were erroneous, and that the court had no jurisdiction of the cause (R. 6).[3] On July 20 1943, the court below permitted the United States to file the petition, and ordered the respondents to show cause why the requested writs should not issue (R. 32–34). After argument was heard and briefs were

[2] Following the filing of the exceptive allegations, certain parties obtained leave of the court to intervene as owners of the cargo laden on the *Brazos*, and filed a petition substantially the same as the libel, seeking recovery of $142,000 from the United States (R. 13–17). The United States consented to the intervention without prejudice to its exceptive allegations and it was agreed by the intervening petitioners that the exceptive allegations be considered as applying to the intervening petition as well as to the libel (R. 5).

[3] On May 3, 1943, the Government's motion for leave to file its petition was denied by the court below "for want of jurisdiction" (R. 30). Thereupon the United States filed in this Court a motion for leave to file an original petition for a writ of prohibition and/or mandamus and, in the alternative, for a writ of certiorari (*Ex Parte United States of America*, No. 15, Original, October Term, 1942). This Court, on June 7, 1943, granted the petition for a writ of certiorari, vacated the order of the court below, and denied the "other relief sought by the Government * * *, without prejudice to an application to the Circuit Court of Appeals" (R. 31–32).

filed, the petition of the United States was granted in all respects (R. 47–49), the court in an opinion dated March 3, 1944, holding that the H. M. S. *Archer* was not a "public vessel of the United States" within the meaning of the Public Vessels Act (R. 40–41). A petition for rehearing (R. 42–45) was denied March 23, 1944 (R. 47).

**ARGUMENT**

While the question presented is important, the decision below is so clearly correct that we believe further review is not warranted. If petitioner were to prevail in this case, the United States would be subjected to liability not merely for its own torts, but for torts of the British Navy whenever the vessel involved was transferred under the Lend-Lease Act. Nothing in either the Public Vessels Act or its legislative history suggests the assumption of so broad and so novel a liability.

1. The Act permits suit only where the damages were caused by a "public vessel of the United States" (see Appendix, p. 15, *infra*). While the phrase "public vessel of the United States" is not defined in the Act, Section 4 of the Act shows that Congress intended to include only vessels which are under the "control" of the United States at the time the cause of action arises. Section 4 provides that—

> No officer or member of the crew of any public vessel of the United States may be

> subpoenaed in connection with any suit authorized under this Act without the consent of the secretary of the department or the head of any independent establishment of the Government *having control of the vessel at the time the cause of action arose,* or of the master or commanding officer of such vessel at the time of the issuance of such subpoena. [Italics supplied.]

This section can apply only to a vessel in the "control" of some department or establishment of the Government "at the time the cause of action arose." For although a subpoena may be issued under Section 4 upon the consent "of the master or commanding officer of such vessel at the time of the issuance of the subpoena," the use of the term "*such* vessel" plainly relates back to the preceding phrase describing a vessel of which the governmental agency had "control * * * at the time the cause of action arose."

This requirement of "control" is also to be found in the legislative history. The Committee Reports recommending adoption of the bill which became the Public Vessels Act contemplate an assumption of liability only for the torts of the Government's agents—persons who by definition would be subject to the "control" of the United States. S. Rep. No. 941 (68th Cong., 2nd Sess.). Recognizing the injustice of a system of relief by private act, the reports quote with approval from a decision of the Court of Claims (*Walton* v. *United States,* 24 C. Cls. 372), suggesting "the line

where the responsibility of the Government should be drawn in cases where the private rights of the citizen have been violated by the negligence of public authority." It describes two classes of cases where "the United States and all other sovereign governments" should be responsible for injuries *"occasioned by the negligence of their agents"*: (1) "where the Government, *through its agents,* manages or controls property from which it receives a benefit or profit"; and (2) "where the Government is using or managing property *through its agents* under circumstances *where these agents* mingle on terms of equality with the general mass of citizens." In the latter case, the quotation continues, "Congress has always recognized the obligation of the Government for injuries *occasioned by the fault of the officers of its naval and other vessels* in maritime collisions." [Italics supplied.] 24 C. Cls. at 377, 379, 380.[4]

The correlation of "control" and sovereign responsibility is not a new departure. It finds precedent in the well settled rule that a vessel owned by a sovereign, but not in the possession and control of its government and not operated by it in its public service, is not a "public vessel" of that sovereign, so as to immunize it from process. *Compania Espanola* v. *Navemar,* 303 U. S. 68, 74;

[4] The quotation in the Court of Claims' opinion is in turn taken, with approval, from a Senate report on a special act of Congress.

*The Western Maid,* 257 U. S. 419; *The Davis,* 10 Wall. 15; *The Attualita,* 238 Fed. 909 (C. C. A. 4); *The Carlo Poma,* 259 Fed. 369 (C. C. A. 2); *Long* v. *The Tampico,* 16 Fed. 491 (S. D. N. Y.). And Chief Justice Marshall defined an "armed public vessel of the sovereign" as a ship which "constitutes a part of the military force of her nation; *acts under the immediate and direct command of the sovereign;* is employed by him in national objects." [Italics supplied.] *The Exchange,* 7 Cranch 116, 143. The petition below makes it plain that the *Archer* was not acting under "the immediate and direct command" of the United States at the time it collided with the *Brazos.*

Moreover, the underlying purpose of the Public Vessels Act was to provide a judicial remedy, where none was available because of the sovereign immunity from suit.[5] Petitioner admits that, but for the statute of limitations, the owners of the *Brazos* could have obtained redress for their injury in the courts of Great Britain (Pet. 11).

[5] In describing the basic evil to be eradicated, the Committee Reports on the bill state (S. Rep. No. 941, 68th Cong., 2nd Sess., p. 2; H. Rep. No. 913, 68th Cong., 1st Sess., p. 2):

"Under the law as it now stands, *no judicial relief is available* to a shipowner * * *. *His only recourse* is to apply to Congress for a private act, which will enable him to have the matter adjudicated in a district court of the United States, or in the Court of Claims. * * * The result is that, if he does succeed in securing *an opportunity to present his claim to a judicial tribunal,* it often happens that, in the press of public business, years may elapse before the desired result is obtained." [Italics supplied.]

Since a remedy was available to the owners of the *Brazos* in a "judicial tribunal," the basic purpose of the Act is inapplicable, requiring exclusion of the instant claim even if it were to fall verbally within the terms of the Act. Cf. *Dobson* v. *United States,* 27 F. (2d) 807 (C. C. A. 2), certiorari denied, 278 U. S. 653; *O'Neal* v. *United States,* 11 F. (2d) 869 (E. D. N. Y.), affirmed, *per curiam,* 11 F. (2d) 871 (C. C. A. 2).

Petitioner puts considerable reliance on the alleged fact that the United States remained the owner of the *Archer.* But there is nothing to show that legal title to the *Archer* was retained and not transferred to the British government. As the court below observed, "the question of her ultimate disposition, and indeed of her actual ownership, was left at large by the Lend-Lease Act and by the receipt given at the time of her transfer" (R. 41). In any event, the question whether the United States intended to assume liability for torts of the agents of a foreign sovereign should not be determined by rules applicable to ordinary business transactions. Bare legal title devoid of other indicia of ownership is often of little weight in fixing legal rights and liabilities. Cf. *Baltimore Dry Docks & Ship Building Co.* v. *New York & P. R. S. S. Co.,* 262 Fed. 485 (C. C. A. 4).

2. Petitioner contends (Pet. 17–20) that the Act imposes liability upon the United States in any

circumstances where the vessel, if privately owned, would be liable *in rem* for acts and omissions of her personnel. This construction of the Act finds no support in its language or its legislative history.[6] Unlike the Suits in Admiralty Act of 1920, which authorizes a libel *in personam* against the United States "in cases where if such vessel were privately owned or operated * * * a proceeding in admiralty could be maintained" (Sec. 2; Appendix, p. 17, *infra*), the Public Vessels Act authorizes such a libel only where the damage is "caused by a public vessel of the United States." (Sec. 1; Appendix, p. 15, *infra.*) This use of entirely different language in Section 1 of the Public Vessels Act and Section 2 of the Suits in Admiralty Act, each delineating the scope of the Act involved, shows clearly that the two Acts were not intended to be coextensive. Where Congress wished to adopt the same provi-

[6] Petitioner (Pet. p. 18) purports to find support for his construction in the Attorney General's letter to the Committee on Claims commenting on the bill, but the Attorney General's remarks were to the contrary, for he stated:

"* * * Suggestions which have come to my notice favoring the bill include the view that the practice of admiralty and international law and procedure place such torts separate and apart from the ordinary torts committed on land, as the vessel is defined the offender rather than the owner of the vessel. The Supreme Court in the *Western Maid* group of cases (257 U. S. 419), has decided to the contrary. * * *" S. Rep. No. 941, 68th Cong., 2d Sess., p. 11; H. Rep. No. 913, 68th Cong., 1st Sess., p. 11.

sions for both Acts, it did so expressly—in the case of procedure (Sec. 2 of the Public Vessels Act).

Section 2 of the Public Vessels Act, providing that suits thereunder "shall be subject to and proceed in accordance with the provisions" of Section 3 of the Suits in Admiralty Act "in so far as the same are not inconsistent herewith," is intended merely to incorporate the procedure for trial of suits authorized by Section 1 of the Public Vessels Act. Even if Section 3 of the Suits in Admiralty Act also extended to substantive matters, it could not broaden the liability imposed by Section 1 of the Public Vessels Act, for to that extent Section 3 of the Suits in Admiralty Act would be "inconsistent" with Section 1 of the Public Vessels Act.

## CONCLUSION

The decision below is clearly correct. Any doubt that the instant case is outside the purview of the Public Vessels Act of 1925 is easily counterbalanced by the fact that the Act as a waiver of sovereign immunity must be strictly construed, *United States* v. *Sherwood,* 312 U. S. 584, 590; *State of Maine* v. *United States,* 45 F. Supp. 35, affirmed, 134 F. (2d) 574, (C. C. A. 1), certiorari denied, 319 U. S. 772, and the fact that the novel disposition of vessels provided for by the Lend-Lease Act was completely unknown to Congress at the time the Public Vessels Act was adopted.

It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1944.

## APPENDIX

1. The Public Vessels Act of 1925, 43 Stat. 1112–1113 (46 U. S. C. 781–790), provides in pertinent part as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a libel in personam in admiralty may be brought against the United States, or a petition impleading the United States, for damages caused by a public vessel of the United States, and for compensation for towage and salvage services, including contract salvage, rendered to a public vessel of the United States: *Provided,* That the cause of action arose after the 6th day of April, 1920.
>
> SEC. 2. That such suit shall be brought in the district court of the United States for the district in which the vessel or cargo charged with creating the liability is found within the United States, or if such vessel or cargo be outside the territorial waters of the United States, then in the district court of the United States for the district in which the parties so suing, or any of them, reside or have an office for the transaction of business in the United States; or in case none of such parties reside or have an office for the transaction of business in the United States, and such vessel or cargo be outside the territorial waters of the United States, then in any district court of the United States. Such suits shall be subject to and proceed in accordance with the provisions of an Act entitled "An Act